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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BOBBIE ALBERT MCCANN,

APPELLANT

INITIAL REPLY BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

Appellant's statement of issue on appeal was:

> The court erred by overruling appellant's objection that the testimony of Elizabeth Willingham would not assist the trier of fact under Rules 702 and 703, SCRE, where she admitted she had very limited knowledge of the present case, and the unduly prejudicial nature of her testimony outweighed any alleged probative value it had to assisting the jury in deciding appellant's guilt or innocence in this case.

Appellant's brief at 1 and 3.

Respondent argues part of the argument above was not raised below. That is incorrect.

Willingham was recognized as an expert in "counseling children thought to be sexually abused." Defense counsel said he had no objection to this particular area of expertise but he quickly objected when the subject of delayed disclosure was raised. Tr. 215, ll. 5-11; Tr. 216, l. 24 – 217, l. 23. Defense counsel argued Willingham admitted she knew *virtually nothing about this case, and that under Rules 702 and 703, SCRE, Willingham did not have any specified knowledge that would assist the trier fact.* Further, Willingham was not relying on facts or data that were made known to her before the hearing that were of the *type reasonably relied upon by experts* in a particular field in forming opinions or inferences on the subject. *Tr. 216, l. 24 – 217, l. 23.*

Defense counsel continued to object that Willingham's opinions went beyond "scope of assisting the trier fact." *He also argued that the probative value of Willingham's testimony was significantly outweighed by its unduly prejudicial effect. . Tr. 216, l.17- 219, l. 22.* The statement of issue on appeal repeated above does not contain any matter that was

not raised to the trial judge in the court below, and ruled upon in the court below. Further, everyone knows a properly qualified expert can reasonably rely on matters made known to her that an expert in that field would reasonably and normally rely on. That was not the objection, and that is not the situation here.

Respondent then refers to "red hearings in appellant's brief." Under this two paragraph section, respondent writes that there was nothing "nefarious at all" about the solicitor bringing out appellant's status as a convicted sex offender in the state's opening argument. Respondent writes this, respectfully, as if there was no context to the solicitor obviously and unnecessarily seeking to taint and prejudice appellant with his prior record so the jury would reach the spurious impermissible conclusion that because appellant did it in the past he likely did it this time also.

The solicitor even cited State v. Hamilton, 327 S.C. 440; 466 S.E.2d 512 (CtApp. 1997) for the proposition that the state did not have to accept the defendant's offer to stipulate to the prior offenses so the jury would not know of them. Prior to Hamilton, the defendant would stipulate to two burglary convictions that constituted **an element** of first degree burglary, and if convicted of the substantive burglary offense he would be sentenced accordingly since he stipulated to the prior two burglary convictions. Tr. 35, l. 5- 40, l. 9.

In short, the solicitor could have stipulated to the prior conviction that constituted an element of the crime. Instead, she sought to ensure that appellant was extremely prejudiced from the very beginning of the trial by the jury knowing of appellant's status. That was unnecessary and unfair. A solicitor is a minister of justice and simply an advocate seeking a conviction. State v. Jones, 343 S.C. 562, 578, 541 S.E.2d 813, 820 (2001); State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000).

Next, the state was apparently not pleased with appellant referring to testimony that the minor alleged victim stated that "Larry (another man) did it". The state points out that another person allegedly overheard the minor saying: "Larry didn't do it. Papa did." Respondents brief at 5. Both statements – "Larry did it" and "Papa did" -- are part of the record. Regardless, tt matters little since Detective Burgess admitted the minor recanted her allegations against appellant **on at least two occasions**. Tr. 183, l. 16-185, l. 24.

Our Supreme Court made clear in State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) that testimony from a forensic interviewer that bolsters the child's testimony is not admissible. The Court strongly held that almost always the only purpose of a forensic interviewer's testimony was to bolster the testimony of the child which is impermissible. Merely changing the name of the expert from a "forensic interviewer" to an expert in "counseling children thought to be sexually abused" does not change the Supreme Court's underlying holding about the inadmissibility of such testimony.

In fact, it is insulting to the Court to make such a thinly veiled attempt to usurp the Supreme Court's unambiguous holding in Kromah. Willingham testified that "*seventy percent of victims have never told anyone they were abused*, and that this was common." Tr. 220, l. 20- 223, l.18. (emphasis added). She also said that ninety percent of abused children were abused by someone they know and was "trusted by the child." Tr. 224, l.12 – 227, l. 2. It's difficult to understand how Willingham knows that seventy percent of victims "have never told anyone" when they have "never told anyone."

In addition, in context, her testimony that ninety percent of abused children were abused by someone they knew and loved was only meant to fit the facts of this case or any other case where very often the person being accused of abuse is in a position of authority

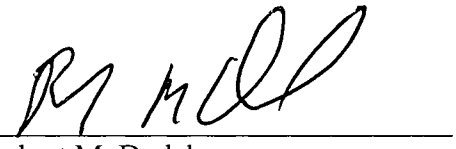
over the child. Evidence that bolsters a child's testimony with the use of such "statistics" without attribution flies in the face of long standing precedent **in this state** which holds such bolstering testimony is not admissible.

The issue is well preserved as shown above. Trial counsel does not have to file an appellate brief attacking what solicitors acting in good faith would cease doing and accept the fact that a forensic interviewer bolstering the child's testimony under another name is still impermissible.

CONCLUSION

By reason of the foregoing argument, and the argument in appellant's initial brief, appellant's conviction should be reversed and this case remanded to the Pickens County Court of General Sessions for new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

This 26th day of November, 2013.

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THE STATE,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of November, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 26th day of November, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021.